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Issue Date: 18 June 2004

Case No.: 2003-LHC-1608

OWCP No.: 07-158775

In the Matter of:

CARLTON CLARKS,
Claimant

vs.

EIU-AVONDALE-OCIP,
Employer

and

ZURICH AMERICAN INSURANCE CO.,
Carrier

APPEARANCES:

ANDREW W. HORSTMYER, ESQ.
On Behalf of the Claimant

CHRISTOPHER K. LeMIEUX, ESQ.
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*., (the "Act" or "LHWCA"). The claim is brought by Carlton Clarks, Claimant, against his former employer, EIU-Avondale-OCIP ("Electrical and Instrumentation Unlimited" or "EIU"), and its carrier Zurich American Insurance Co., Respondents. Claimant asserts that he

suffers from a back condition for which Respondents are responsible. A hearing was held on February 12, 2004 in Metairie, Louisiana, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence[1]:

1) Joint Exhibit 1;

2) Claimant's Exhibits A-H; and

3) Respondent's Exhibits Nos. 1-18.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely, received from both parties. This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS

The Court finds sufficient evidence to support the following stipulations[2]:

1) Claimant was injured on December 6, 2000.

2) At the time of Claimant's injury, Claimant was employed by EIU.

3) Employer was advised of Claimant's injury on December 7, 2000.

4) A Notice of Controversion was filed on December 15, 2000, October 21, 2002, and February 18, 2003.

5) An Informal Conference was held on March 17, 2003.

6) Claimant was temporarily totally disabled from December 14, 2000 to February 9, 2003, for which period Respondents paid to Claimant a total of $33,382.44 in benefits, at a rate of $297.39 per week for 112.28 weeks.

7) From February 10, 2003 to February 5, 2004, Respondents paid to Claimant $6,256.64 in partial disability benefits, at a rate of $120.32 per week for 52 weeks.

8) Respondent has paid medical benefits to Claimant in part.

[1] The following abbreviations will be used in citations to the record: JX – Joint Exhibit; CX – Claimant's Exhibit; RX – Respondent's Exhibit; and TR – Transcript of the proceedings.

[2] JX-1.

ISSUES

The unresolved issues in these proceedings are:

(1) Fact of Injury and Causation;

(2) Nature and Extent of Disability;

(3) Average Weekly Wage;

(4) Reasonable and Necessary Medical Benefits; and

(5) Attorney's Fees.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Carlton Clarks

Mr. Clarks was born in December 1960. TR. 22. Mr. Clarks graduated from high school and received no additional training after high school. TR. 23, 41. During high school, he performed janitorial work for Westbank Janitorial and for McDermott. TR. 23. After high school, Mr. Clarks became employed as a laborer at Geosource Shipyard. TR. 23. After Geosource Shipyard, Mr. Clarks worked for Avondale as a tack welder. TR. 23. Mr. Clarks worked at Avondale for two years, from 1980 to 1982, ultimately progressing to the position of welder. TR. 24, 43. After leaving Avondale, Mr. Clarks worked for six years as a bus driver for Jefferson Parish. TR. 24, 43. He then returned to work as a welder, at Textron Marine. TR. 24. Mr. Clarks worked at Textron Marine for five years. TR. 24. After Textron Marine, Mr. Clarks returned to Avondale as a welder for about one year, in about 1995 or 1996. TR. 25, 43. Mr. Clarks then left Avondale again, for work with contractors affiliated with Avondale. TR. 25. The last of these contractors was EIU, for whom Mr. Clarks worked as a welder beginning in about June 1999. TR. 25, 44; CX-E, p. 5. Mr. Clarks' work for EIU took place at Avondale Shipyard. TR. 44.

Mr. Clarks testified that he had never been injured on the job prior to working for EIU. TR. 25. Mr. Clarks testified that his work injury occurred on December 6, 2000, while working for EIU at Avondale Shipyard. TR. 25-26, 44. Mr. Clarks testified that he was on his way to the tool room when he was asked by Calvin Jacks to help lift a toolbox. TR. 26, 46. Mr. Clarks helped Mr. Jacks lift the toolbox, which Mr. Clarks estimated to weigh about 140 pounds. TR. 26. Mr. Clarks testified that after helping Mr. Jacks with the tool box, he and Mr. Jacks each went on with their respective work.

TR. 26. Mr. Clarks testified that he did not feel anything in his back while lifting the toolbox, but instead began feeling pain during the night of the toolbox incident. TR. 26, 52-57, 67.

Mr. Clarks testified that he told Mr. Jacks a couple days after the toolbox incident that he had hurt his back while helping with the tool box. TR. 26. Mr. Clarks explained that he did not tell Mr. Jacks sooner because he and Mr. Jacks worked at different ends of the yard and he did not see Mr. Jacks. TR. 27, 46.

Mr. Clarks testified that he reported the injury to his foreman and the First Aid Office the next day, December 7, 2000. TR. 27, 46-47. Mr. Clarks testified that he was aware that he was supposed to report all work accidents the day of the accident, but explained that he did not begin hurting until the night following the toolbox incident. TR. 44-46. The First Aid Office's First Report of Injury document indicates that Mr. Clarks was injured on December 7, 2000, and that Mr. Clarks "stated that he didn't do anything at work to make his back hurt." RX-1, p. 1. Mr. Clarks denied making such a statement. TR. 51-52. In response to the line, "Exact place where accident occurred," the First Report of Injury document indicates, "—N/I—." RX-1, p. 1. Mr. Clarks testified that the information on the report was incorrect and that he indicated to the First Aid employee that he had hurt his back on December 6th, while lifting a toolbox in the yard. TR. 27-29, 51-52. Mr. Clarks was eventually referred by the First Aid Office to a doctor at West Jefferson Hospital. TR. 28-30.

Mr. Clarks testified that his doctor's visit at West Jefferson Hospital consisted only of a visual examination for about 5 to 10 minutes. TR. 30-31. Mr. Clarks testified that the doctor indicated Mr. Clarks was fine and could go back to work. TR. 30-31. Mr. Clarks testified that he tried returning to work, but again had complaints after one day. TR. 31.

After his complaints upon returning to work, Mr. Clarks was sent to Dr. Phillip Farris. TR. 31. According to Mr. Clarks, Dr. Farris indicated that Mr. Clarks had strained muscles and directed Mr. Clarks to stay home. TR. 31. Mr. Clarks testified that he visited with Dr. Farris a few more occasions over the following few months and was treated with pain medication. TR. 31, 66. According to Mr. Clarks, Dr. Farris ultimately ordered an MRI, which revealed a herniated disc. TR. 31-32. Mr. Clarks testified that Dr. Farris then referred him to Dr. Robert Applebaum. TR. 32.

According to Mr. Clarks, Dr. Applebaum indicated that Mr. Clarks' bulge was natural and offered him only physical therapy. TR. 32. Mr. Clarks testified that the physical therapy did not help. TR. 32. Mr. Clarks testified that he was then sent by Dr. Applebaum back to Dr. Farris. TR. 32-33. Mr. Clarks testified that he was not comfortable with Dr. Applebaum's conclusions, and Mr. Clarks at that point hired an attorney. TR. 33.

Mr. Clarks testified that he then came under the care of Dr. Bradley Bartholomew, a neurosurgeon. TR. 34. According to Mr. Clarks, Dr. Bartholomew indicated that Mr. Clarks' MRI revealed a bulging disc. TR. 34. Mr. Clarks testified that he continued under the care of Dr. Bartholomew and was treated with medication and pain management injections. TR. 34-35. Mr. Clarks testified that he eventually underwent a myelogram, which revealed nerve damage. TR. 35. Mr. Clarks testified that Dr. Bartholomew ultimately recommended surgery for Mr. Clarks. TR. 35.

Mr. Clarks testified that he was involved in a car accident in October 2001. TR. 36. According to Mr. Clarks, he was stopped at a red light when he was rear-ended by a pick up truck. TR. 36. Mr. Clarks testified that the driver was issued a ticket, cited for a DWI, and arrested on the scene. TR. 37. Mr. Clarks testified that his car suffered damage to the bumper, minor body damage near the bumper, and a chipped light. TR. 37. Mr. Clarks testified that the car accident caused him neck pain with some aggravation of his back condition. TR. 58-59, 64.

Mr. Clarks testified that his back pain increased for a few weeks after the car accident, after which time his back pain returned to the level it was prior to the car accident. TR. 38, 64-65. Mr. Clarks testified that he was referred by his lawyer to Dr. Leia Frickey at Allied Adult Clinic ("Allied") for the increase in his pain. TR. 38, 58-60. Mr. Clarks received heat and stimulator shock treatments on his back at Allied. TR. 38, 68. Mr. Clarks was treated for back complaints at Allied from October 2001 until April 2002. TR. 61. According to Mr. Clarks, he suffered a strained neck due to the car accident that resolved about one month after the accident. TR. 59-60. Mr. Clarks testified that he also reported the car accident to Dr. Bartholomew, but treated with Dr. Frickey in order to keep his work accident and car accident cases separate for legal purposes. TR. 38, 59.

Mr. Clarks testified that he settled the car accident case for $20,000.00, of which he received $10,000.00. TR. 37-38. Mr. Clarks testified that he did not use the money to fix his car, but instead needed the money to pay his bills. TR. 37, 62. Mr. Clarks testified that despite receiving full disability benefits at the time of his car accident settlement, he did not have enough money to take care of himself. TR. 63-64, 69. Mr. Clarks testified that he was accustomed to making much more money while working, specifically $568.00 in take home pay versus $297.00 in full disability benefits. TR. 69-70.

Mr. Clarks testified that he was paid $11.00/hour at EIU, plus a $7.00/hour *per diem* for living expenses. TR. 39-40. Mr. Clarks testified that the *per diem* portion of his earnings was not taxed. TR. 39-40. Mr. Clarks testified that he lives about 10-12 miles from Avondale Shipyard, in Gretna, Louisiana. TR. 40. Mr. Clarks testified that

he did not have a choice in how his wages were paid and did not know why EIU split his compensation between a wage and the *per diem* disbursement. TR. 40, 45.

Mr. Clarks testified that he continues having pains in his low back and down his leg. TR. 38-39. Mr. Clarks testified that he is unable to work in his current condition. TR. 39. Mr. Clarks opined that he also was unable to work during the summer of 2001, because of his back and leg pains. TR. 39. Mr. Clarks was not aware that Dr. Bartholomew had opined Mr. Clarks was able to perform at least some level of work. TR. 65. Mr. Clarks testified that he was also not aware that Nancy Favaloro, a vocational rehabilitation specialist in this case, offered to perform job placement services for him to help find him a job. TR. 65.

Calvin Jacks

Mr. Jacks was born in October 1962. TR. 71. Mr. Jacks testified that he works at Avondale as a First Class Welder. TR. 71. Mr. Jacks testified that Mr. Clarks helped him lift a toolbox one afternoon in the early 2000s. TR. 71-72, 74-76. According to Mr. Jacks, Mr. Jacks was beginning his shift at the time of the toolbox incident, while Mr. Clarks was finishing his shift. TR. 75. Mr. Jacks testified that, although he never actually weighed it, his toolbox probably weighed about 65 to 70 pounds at the time Mr. Clarks helped him lift it. TR. 76-77.

Mr. Jacks testified that Mr. Clarks did not say anything during the toolbox incident about hurting Mr. Clarks' back. TR. 75. Mr. Jacks testified that Mr. Clarks informed him a couple days afterward that Mr. Clarks had hurt himself while lifting the toolbox. TR. 72-75. Mr. Jacks testified that he has not spoken to Mr. Clarks since this conversation. TR. 74. Mr. Jacks testified that he knew Mr. Clarks when they were teenagers because both men lived in the same neighborhood, but that they no longer live in the same neighborhood as each other. TR. 75.

II. MEDICAL EVIDENCE

1. Testimony and Reports

Phillip Farris, M.D.

Dr. Farris testified by way of deposition on October 1, 2003. CX-D. Dr. Farris is a board eligible orthopaedic surgeon at the Bone and Joint Clinic. CX-D, p. 5. Dr. Farris first evaluated Mr. Clarks on December 14, 2000, upon referral from EIU. CX-D, p. 6. According to Dr. Farris, Mr. Clarks reported injuring his lower back about eight days earlier while lifting a toolbox. CX-D, pp. 6-7. The only significant findings of Dr. Farris' physical examination were paralumbar muscle spasms, with the right side being more involved than the left. CX-D, p. 7. Dr. Farris opined that Mr. Clarks had suffered

an acute back sprain and held Mr. Clarks out of work until December 19, 2000. CX-D, p. 7. Dr. Farris testified that Mr. Clarks, over the course of his treatment with Dr. Farris, consistently continued to have muscle spasms in his back upon physical examination, which Dr. Farris related either to nerve irritation or muscle strain. CX-D, pp. 16-17.

Mr. Clarks returned to Dr. Farris on December 19, 2000 and December 26, 2000. CX-D, pp. 7-9. During that period, Mr. Clarks continued to complain of lower back pain radiating down into his right leg. CX-D, pp. 7-8. Dr. Farris noted no significant changes in Mr. Clarks' condition and continued with his assessment of a resolving back strain. CX-D, pp. 8-9. Dr. Farris allowed Mr. Clarks to return to regular duty work on January 2, 2001. CX-D, pp. 9-10.

Dr. Farris again saw Mr. Clarks on January 4, 2001. CX-D, p. 9. Mr. Clarks reported that he was having pain radiating into both buttocks after attempting to perform welding work. CX-D, p. 10. As a result, Dr. Farris returned Mr. Clarks to non-work status until January 18, 2001. CX-D, p. 10. Dr. Farris continued to opine that Mr. Clarks had a sustained back strain, but Dr. Farris ordered an MRI of the lumbar spine due to the chronic nature of Mr. Clarks' pain. CX-D, pp. 10-11.

Dr. Farris testified that the MRI was performed by Dr. Heard at Diagnostic Imaging Services. CX-D, p. 11. Dr. Farris indicated that Dr. Heard found a small, central type IIb disc extrusion posteriorly at the L5-S1 level, which resulted in mild central spinal stenosis, with no thecal sac or nerve root encroachment. CX-D, p. 11. Based on the MRI findings, Dr. Farris referred Mr. Clarks to Dr. Applebaum, a spine specialist. CX-D, pp. 11-13.

Dr. Farris last saw Mr. Clarks on June 25, 2001, at which time Mr. Clarks had begun treating with Dr. Bartholomew. CX-D, pp. 13-14. At that time, Dr. Farris directed Mr. Clarks to return to work on June 26th, with no restrictions. CX-D, pp. 13-14. Dr. Farris testified that he did not review Mr. Clarks' myelogram and CT scan of February 26, 2002. CX-D, p. 16.

Robert Applebaum, M.D.

Dr. Applebaum testified by way of deposition on October 13, 2003. RX-16. Dr. Applebaum is a board certified neurosurgeon. RX-16, pp. 5-6. Dr. Applebaum first saw Mr. Clarks on February 6, 2001, for complaints of low back pain and occasional pain in his right thigh. RX-16, pp. 6-8. Mr. Clarks reported that his complaints stemmed from a work injury on December 7, 2000, while lifting a heavy toolbox. RX-16, p. 7. Dr. Applebaum indicated that Mr. Clarks' physical examination revealed minimal mechanical deficit and no neurological deficit. RX-4, p. 2. Dr. Applebaum reviewed the film of Mr. Clarks' January 23, 2001 MRI of the lumbar spine. RX-4, p. 2; RX-16, pp. 10-11, 29. Dr. Applebaum disagreed with Dr. Heard's interpretation that Mr. Clarks'

MRI revealed a disc extrusion. RX-16, p. 30. According to Dr. Applebaum, the MRI showed only minimal bulging at the L5-S1 level, which was related to aging and was not clinically significant. RX-4, p. 2; RX-16, pp. 11, 30-33, 50-51. Dr. Applebaum testified that a mild central spinal stenosis could cause pain in the legs, bowel or bladder problems, and pain in the low back if it were severe enough. RX-16, p. 34. However, Dr. Applebaum opined that Mr. Clarks had suffered only a mild lumbar strain and recommended that Mr. Clarks undergo physical therapy for two to four weeks. RX-4, p. 2; RX-16, p. 11.

Dr. Applebaum next saw Mr. Clarks on April 3, 2001. RX-16, p. 11. Mr. Clarks had been undergoing physical therapy for a month and reported no significant improvement. RX-16, p. 11. Mr. Clarks continued to complain primarily of back pain, with some pain in his right posterior thigh. RX-16, p. 12. After performing a physical examination, Dr. Applebaum opined that Mr. Clarks did not have disease or damage of either the spinal cord or nerve roots. RX-4, p. 4; RX-16, p. 13. Dr. Applebaum did not feel that Mr. Clarks needed any further neurosurgical, diagnostic, or therapeutic procedures. RX-16, p. 13. Dr. Applebaum testified that he discontinued physical therapy treatment because the therapy was not helping Mr. Clarks. RX-16, p. 35.

Dr. Applebaum again saw Mr. Clarks on October 24, 2001, upon referral from Nancy Favaloro. RX-4, p. 5; RX-16, pp. 13-14. Mr. Clarks continued with the same back and right posterior leg pain complaints. RX-16, p. 14. Mr. Clarks reported being involved in a car accident in which he was rear-ended, causing pain in his neck and increased pain in his low back. RX-16, p. 15. Upon physical examination, Dr. Applebaum found that Mr. Clarks had a right straight leg test result more severe than his previous examinations, and therefore was concerned Mr. Clarks had injured or re-injured his back in the car accident. RX-16, pp. 16-18. Dr. Applebaum indicated that Mr. Clarks also demonstrated diminished sensation to a pinprick in the lateral aspect of his right foot. RX-4, p. 5; RX-16, p. 16.

Dr. Applebaum testified that he did not know the severity of the car accident and that his assessment of a connection between the car accident and Mr. Clarks' increased problems during his examination was based on Mr. Clarks' reporting of increased pain in his back after the car accident. RX-16, p. 37. Dr. Applebaum understood at that time that Mr. Clarks was reporting a temporary increase in his symptoms due to the car accident. RX-16, p. 37. Dr. Applebaum testified that Mr. Clarks' straight leg testing and the diminished sensation to the pinprick of Mr. Clarks' foot could be indications of nerve root irritation. RX-16, pp. 16-18, 42-43, 46, 49.

Nonetheless, Dr. Applebaum continued to opine that it was unlikely Mr. Clarks had a ruptured disc or nerve root irritation. RX-4, p. 6. However, given Mr. Clarks' prolonged symptoms, Dr. Applebaum recommended a lumbar myelogram followed by a CAT scan to rule out the possibility of a significant interspinal problem. RX-4, p. 6; RX-

16, p. 18. Dr. Applebaum testified that the lumbar myelogram and CAT scan were completed in February 2002. RX-16, p. 19. According to Dr. Applebaum's interpretation, the CAT scan revealed some mild bulging in the L4-5 disc that was not clinically significant. RX-4, p. 8; RX-16, pp. 19, 43-44, 53. Dr. Applebaum opined that Mr. Clarks did not have a ruptured disc or nerve root irritation and was able to return to moderate work. RX-16, pp. 19, 53. Despite Dr. Applebaum's interpretation of Mr. Clarks' January 23, 2001 MRI, Dr. Applebaum testified that the CAT scan did not show a disc bulge at L5-S1. RX-16, p. 44. Dr. Applebaum explained that the previous disc bulge probably became resolved back into place due to the natural healing process of the body. RX-16, pp. 44-45.

Dr. Applebaum disagreed with Dr. Ramirez's assessment of Mr. Clarks' myelogram and CAT scan. RX-16, p. 46. Dr. Applebaum explained that a diagnosis of nerve root irritation cannot be made solely based on the findings of a myelogram and CAT scan, without also knowing the subjective complaints, examination results, and history of the patient. RX-16, pp. 46-47. Dr. Applebaum testified that Mr. Clarks' history contains elements that are not consistent with S1 nerve root irritation: the fact that Mr. Clarks had pain in his right buttock did not have pain below the knee, and that his pain was not helped with rest. RX-16, p. 49.

Dr. Applebaum last saw Mr. Clarks on September 24, 2002, again upon referral from Nancy Favaloro. RX-4, p. 7; RX-16, pp. 19, 26. Mr. Clarks complained of pain in his lower back and left flank and weakness in his left leg. RX-16, p. 19. Dr. Applebaum testified that Mr. Clarks' complaints had changed somewhat from his last visit, in that his pain was on his left side rather than his right side. RX-16, pp. 19-22. Dr. Applebaum indicated that Mr. Clarks also had some bowel complaints that had not existed before. RX-16, pp. 19-22. Dr. Applebaum opined that Mr. Clarks had some mild degenerative changes in his lumbar spine with no neurological impingement or impairment. RX-16, pp. 23-24, 50-51, 55. Dr. Applebaum indicated that surgical intervention was not warranted. RX-4, p. 8; RX-16, pp. 23-24, 55.

With respect to future treatment, Dr. Applebaum recommended only minor analgesics and anti-inflammatory medication that could be obtained over-the-counter. RX-16, pp. 23-25. Dr. Applebaum opined that Mr. Clarks was at maximum medical improvement. RX-4, p. 8. Dr. Applebaum opined that Mr. Clarks could return to any form of moderate work, with restrictions of no prolonged bending or stooping and no lifting of greater than 40 to 50 pounds. RX-4, pp. 8-9; RX-16, pp. 23-24. Dr. Applebaum testified that he did not independently recall Mr. Clarks, but that an absence of negative notation in his reports regarding Mr. Clarks' honesty indicates that he did not take issue with Mr. Clarks' honesty. RX-16, pp. 28-29, 4041.

Bradley J. Bartholomew, M.D.

Dr. Bartholomew testified by way of deposition on February 4, 2004. CX-B. Dr. Bartholomew opined that Mr. Clarks' back pain and pain radiating to his knee were related to a herniated disc. CX-B, pp. 9-11. Dr. Bartholomew opined that Mr. Clarks' leg pain was being caused nerve root contact with the herniated disc and that his back pain was caused by the displacement of the disc itself. CX-B, p. 16.

Dr. Bartholomew first met with Mr. Clarks on June 5, 2001, based on a referral by Mr. Clarks' attorney. CX-A, p. 25; CX-B, pp. 5, 30-31. At that time, Mr. Clarks was suffering constant low back pain, which was worse with activity or frequent change of positions, and pain going down his right leg to the posterior aspect of his knee. CX-A, p. 25; CX-B, p. 5. His pain was worse when he got up and started to walk. CX-A, p. 25; CX-B, p. 6. Mr. Clarks reported to Dr. Bartholomew that his complaints stemmed from a work incident on December 6, 2000, in which Mr. Clarks helped lift a 200 pound tool box. CX-A, p. 25; CX-B, p. 6. Mr. Clarks reported that he began to feel pain the next day. CX-A, p. 25; CX-B, p. 6.

Mr. Clarks also reported that he had seen a physician two days after the work injury and was told by the physician to return to work. CX-A, p. 25; CX-B, p. 6. Dr. Bartholomew noted that Mr. Clarks was also treated Dr. Farris, who indicated that he was suffering muscle spasms, and Dr. Applebaum, who indicated that he had a naturally herniated disc. CX-A, p. 25; CX-B, pp. 6-7.

Dr. Bartholomew performed a physical examination and reviewed a January 23, 2001 MRI of Mr. Clarks' lumbar spine. CX-A, p. 25; CX-B, p. 7. Dr. Bartholomew indicated that the MRI revealed a herniated/extruded disc at L5-S1. CX-A, p. 25; CX-B, p. 7. Dr. Bartholomew opined that Mr. Clarks had a traumatic disc herniation, with elements of segmental instability, mechanical back pain, and lumbar radiculopathy resulting from the herniated disc. CX-A, p. 25; CX-B, p. 8.

Dr. Bartholomew next saw Mr. Clarks on June 26, 2001, at which time Mr. Clarks continued to have complaints of back pain and pain going down to his right knee. CX-A, p. 23; CX-B, p. 9. Dr. Bartholomew proceeded with conservative treatment for Mr. Clarks. CX-A, p. 23; CX-B, p. 10.

Dr. Bartholomew again saw Mr. Clarks on August 7, 2001, at which time Mr. Clarks indicated his pain was worse. CX-A, p. 21; CX-B, p. 10. Dr. Bartholomew indicated that Mr. Clarks was still neurologically intact, and Dr. Bartholomew continued with conservative treatment. CX-A, p. 21; CX-B, p. 11.

Mr. Clarks returned to Dr. Bartholomew on August 28, 2001. CX-A, p. 19; CX-B, p. 11. Mr. Clarks' pain complaints continued, with pain in his back going to both buttocks. CX-A, p. 19; CX-B, p. 11. Dr. Bartholomew recommended a discogram for further evaluation of whether surgery would be required, but Dr. Bartholomew's recommendation was denied by the carrier. CX-A, p. 19; CX-B, pp. 11-12.

Dr. Bartholomew next saw Mr. Clarks on November 27, 2001. CX-A, p. 17; CX-B, p. 13. Mr. Clarks reported that he was involved in a car accident in which he was rear-ended. CX-A, p. 17; CX-B, p. 13. Mr. Clarks reported that the car accident caused him some neck soreness, but that the soreness had since resolved. CX-A, p. 17; CX-B, p. 13. Mr. Clarks reported having the same back pain that he had prior to the accident. CX-A, p. 17; CX-B, p. 13. Dr. Bartholomew conducted a physical examination and opined that Mr. Clarks suffered a cervical strain from the car accident that had subsequently resolved. CX-A, p. 17; CX-B, p. 15. Dr. Bartholomew opined that Mr. Clarks' car accident likely had no effect on his back condition if the cars in the accident had no damage whatsoever and Mr. Clarks reported only the same back pain that pre-existed the car accident. CX-B, p. 14.

On February 26, 2002, Mr. Clarks underwent a myelogram and post-myelogram CAT scan based on a request by Dr. Applebaum. CX-A, p. 14; CX-B, p. 15. Dr. Bartholomew indicated that the radiologist noted a concentric disc bulge at L4-5, without canal stenosis or neural foramina narrowing, and a concentric disc bulge at L5-S1 which was approaching/contacting the S1 nerve roots bilaterally, without stenosis or neural foramina. CX-B, p. 15. Dr. Bartholomew opined that the CAT scan also revealed a large annular meningial interspace ("AMI")[3], with a disc herniation at L5-S1 contacting nerve roots. CX-A, p. 14; CX-B, p. 16. Dr. Bartholomew testified that even if the herniated disc is not actually touching a nerve root, herniated disc material approaching or near a nerve root can cause an inflammatory response mimicking a compression, which would affect Mr. Clarks' right leg pain. CX-B, pp. 25-26. Dr. Bartholomew explained that the inflammatory response would cause irritation in the nerve root, which reproduces pain in the distribution of the nerve root and causes the same type of symptom that an actual compression of the nerve root would cause. CX-B, p. 26.

Dr. Bartholomew next saw Mr. Clarks on March 19, 2002. CX-A, p. 14; CX-B, p. 17. Mr. Clarks had new complaints about urgency with urination, for which Dr. Bartholomew recommended Mr. Clarks see a urologist. CX-A, p. 14; CX-B, pp. 17-19. This recommendation has been denied by the carrier. CX-A, pp. 8, 10; CX-B, p. 20. Dr. Bartholomew also recommended that Mr. Clarks be treated with lumbar epidural steroid

[3] According to Dr. Bartholomew, an AMI is a space between a disc and the dural sac. CX-B, p. 16.

injections. CX-A, p. 14; CX-B, p. 17. Two lumbar epidural steroid injections were administered to Mr. Clarks by Dr. Patrick Waring at Memorial Medical Center, on April 15, 2002 and May 9, 2002 respectively. CX-A, p. 12; CX-B, pp. 17-18; RX-6, pp. 22-23, 37-38. These injections provided Mr. Clarks no relief. CX-A, p. 12; CX-B, pp. 17-18.

On July 9, 2002, Dr. Bartholomew indicated that Mr. Clarks was a candidate for L5-S1 surgery, given Mr. Clarks' failure to improve through conservative treatment, including medication, physical therapy, and steroid injections. CX-A, p. 12; CX-B, pp. 18-19. Dr. Bartholomew recommended that Mr. Clarks undergo either a diskectomy or a fusion. CX-A, p. 12; CX-B, p. 19. According to Dr. Bartholomew, the diskectomy most likely would not help with Mr. Clarks' back pain, but may reduce Mr. Clarks' leg pain and may or may not resolve his urological complaints. CX-A, p. 12; CX-B, p. 19. Dr. Bartholomew testified that a fusion would be a more involved operation, but would address Mr. Clarks' broad based herniation and back pain. CX-A, p. 12; CX-B, p. 19. Dr. Bartholomew testified that Mr. Clarks opted for the diskectomy first, with the understanding that a fusion may later be necessary. CX-A, p. 12; CX-B, p. 19. Dr. Bartholomew testified, however, that his recommendation for surgery has been denied by the carrier. CX-B, p. 19.

On April 22, 2003, Mr. Clarks had continued complaints of pressure in his bladder, without incontinence. CX-A, p. 8; CX-B, p. 20. Given the carrier's continued denial of the urological consultation and surgery, Dr. Bartholomew indicated that he could offer Mr. Clarks no other treatment. CX-A, p. 8; CX-B, p. 21. Dr. Bartholomew discussed with Mr. Clarks the possibility of treatment from Charity Hospital. CX-A, p. 8; CX-B, p. 21. Dr. Bartholomew has not seen Mr. Clarks since April 22, 2003. CX-B, p. 21. Dr. Bartholomew's bills have all been paid by the carrier. CX-B, p. 21.

Dr. Bartholomew testified that he reviewed Dr. Applebaum's deposition prior to his own deposition. CX-B, p. 21. In contrast to Dr. Applebaum, Dr. Bartholomew opined that Mr. Clarks is a good candidate for surgery, based on an abnormal MRI scan and abnormal post-myelogram CAT scan, to help decrease Mr. Clarks' pain after conservative measures has failed. CX-B, pp. 23-24. Dr. Bartholomew disagreed with Dr. Applebaum's interpretation of Mr. Clarks' January 23, 2001 MRI. CX-B, p. 22. Dr. Bartholomew also disagreed with Dr. Applebaum's interpretation of Mr. Clarks' February 26, 2002 post-myelogram CAT scan, in that Dr. Applebaum's interpretation did not include the large AMI seen by Dr. Bartholomew. CX-B, p. 22.

Dr. Bartholomew testified that Mr. Clarks does not require surgery in the sense that Mr. Clarks would die without it, but instead as a last resort for reducing Mr. Clarks' severe pain after conservative measures have failed. CX-B, pp. 27-28. Dr. Bartholomew testified that Mr. Clarks was reluctant about surgery initially but wished to proceed with surgery by the time of Mr. Clarks' last two visits, because of the nature of the pain. CX-B, p. 28. Dr. Bartholomew testified that he would recommend a pain management

program as an alternative for a patient who does not want surgery. CX-B, p. 28. Dr. Bartholomew testified that he would not first recommend pain management to a patient willing to have surgery because pain management is meant for people with chronic pain that is not amenable by surgical means. CX-B, pp. 28-30.

Dr. Bartholomew opined that Mr. Clarks might be able to return to sedentary work as long as Mr. Clarks could frequently alternate his sitting, standing, and walking positions and was not taking medication that interfered with his ability to think or function. CX-B, p. 30.

Leia Frickey, M.D.

Dr. Frickey testified by way of deposition on October 31, 2003. CX-C. Dr. Frickey is a general practitioner at Allied Adult and Child Clinic, performing mostly personal injury work. CX-C, pp. 5-6; RX-2. Dr. Frickey first treated Mr. Clarks on November 12, 2001. CX-C, p. 7; RX-2, p. 1. Mr. Clarks complained of neck and low back pain, with radiating pain in his right buttock going into the right lower extremity. CX-C, pp. 7-8; RX-2, p. 1. Dr. Frickey indicated that Mr. Clarks was a restrained driver of a vehicle that was stopped at a red light when he was rear-ended and jerked forward. CX-C, pp. 9-10; RX-2, p. 1. Dr. Frickey indicated that Mr. Clarks reported a prior work injury in December 2000 that resulted in a herniated disc at L5-S1. CX-C, p. 10; RX-2, p. 1. Upon physical examination, Dr. Frickey noticed that Mr. Clarks had a spasm in his paraspinous muscle and radicular symptoms in his right side. CX-C, p. 10-12; RX-2, p. 2. Dr. Frickey opined that Mr. Clarks had suffered (1) a resolving cervical sprain with residual stiffness and (2) a lumbar sprain. CX-C, pp. 11-13; RX-2, p. 2. Dr. Frickey related Mr. Clarks' cervical and lumbar sprains to the car accident. CX-C, pp. 17, 34. Dr. Frickey testified that although she did not include a disc herniation in her diagnostic impression, she acknowledged such a condition in her report and assumed that the condition existed. CX-C, pp. 14-16.

Dr. Frickey testified that she treats a patient with a cervical and lumbar sprain with conservative measures for three to six months on average. CX-C, pp. 17-18. Dr. Frickey treated Mr. Clarks with conservative measures, including moist heat, medication, and Transcutaneous Electrical Nerve Stimulation three times a week. CX-C, p. 18.

Dr. Frickey next saw Mr. Clarks on November 26, 2001, at which time Mr. Clarks reported that his neck pain was resolved and his low back pain continued. CX-C, p. 19; RX-2, p. 2. Dr. Frickey continued to treat Mr. Clarks with conservative treatment. CX-C, p. 20; RX-2, p. 2.

Dr. Frickey saw Mr. Clarks again on December 17, 2001 and January 7, 2002. CX-C, pp. 21-22; RX-2, p. 2. During this period, Mr. Clarks continued with low back pain complaints. CX-C, p. 21; RX-2, p. 2. Dr. Frickey continued to treat Mr. Clarks for a lumbar sprain. CX-C, p. 23. Dr. Frickey indicated that Mr. Clarks was still symptomatic, but that his condition was unchanged and mostly stable. CX-C, p. 23.

Mr. Clarks returned to Allied on January 28, 2002, at which time he followed up with Dr. Bordenaro. CX-C, p. 24; RX-2, p. 2. Mr. Clarks' condition remained essentially the same. CX-C, p. 24; RX-2, p. 2. Dr. Bordenaro ordered physical therapy for Mr. Clarks two times a week, as a therapeutic measure. CX-C, p. 25; RX-2, p. 2.

Mr. Clarks returned for a follow-up with Dr. Frickey on February 19, 2002. CX-C, p. 26; RX-2, p. 3. Based on Mr. Clarks' January 23, 2001 MRI, Dr. Frickey opined that Mr. Clarks had a herniated disc at L5-S1. CX-C, pp. 26-29, 33-34; RX-2, p. 3. Dr. Frickey indicated that it was difficult to determine if the herniated disc is related to Mr. Clarks' car accident without further testing. CX-C, pp. 33-34. Dr. Frickey testified that she believed surgery was an option for Mr. Clarks but that she deferred to the opinion of Dr. Bartholomew, who was Mr. Clarks' treating neurosurgeon. CX-C, pp. 29-30, 41-43, 45-46, 49. Dr. Frickey explained that she treated Mr. Clarks for his back strain from the car accident, which was superimposed in the same area as his herniated disc, but would defer treatment of Mr. Clarks' L5-S1 disc herniation problem to his neurosurgeon. CX-C, p. 48. According to Dr. Frickey, her office provided conservative treatment and physical therapy for Mr. Clarks' soft tissue injury, care that Dr. Bartholomew's office did not offer. CX-C, pp. 38-39.

Dr. Frickey next saw Mr. Clarks on March 12, 2002, at which time Mr. Clarks' condition and treatment continued. RX-2, p. 3. Mr. Clarks also complained of urinary urgency and frequency and was advised by Dr. Frickey to consult with his primary care physician. RX-2, p. 3.

Dr. Frickey again saw Mr. Clarks on April 2, 2002. RX-2, p. 3. Mr. Clarks' condition and treatment were unchanged. RX-2, p. 3. Dr. Frickey last saw Mr. Clarks on April 15, 2002, at which time Mr. Clarks continued with the same lumbar pain complaints. CX-C, p. 40; RX-2, p. 3. Dr. Frickey discharged Mr. Clarks on April 15th, indicating that he had reached maximum medical benefit in his treatment with her. CX-C, pp. 40-41; RX-2, p. 3.

2. Reports

Diagnostic Imaging Services

Dr. John L. Heard performed an MRI of Mr. Clarks' lumbar spine on January 23, 2001. CX-G. The MRI results indicated that Mr. Clarks had a small central type IIb disc extrusion posteriorly at the L5-S1 level which resulted in mild central spinal stenosis, with no thecal sac or nerve rootlet encroachment shown. CX-G.

On February 26, 2002, Mr. Clarks underwent a lumbar myelogram and post-myelogram CT scan of the lumbar spine. CX-A, p. 30; CX-G. Dr. Jorge Ramirez indicated: (1) that the lumbar myelogram was successful; (2) that a concentric disc bulge existed at L4-5 without canal stenosis or neural foramina narrowing; and (3) that a concentric disc bulge existed at L5-S1 which was approaching/contacting the S1 nerve root bilaterally, with no canal stenosis or neural foramina narrowing. CX-A, p. 31; CX-G.

III. VOCATIONAL EVIDENCE: Testimony and Reports

Nancy Favaloro

Ms. Favaloro testified that she was asked by EIU in about September 2001 to initiate services regarding Mr. Clarks, including contacting Mr. Clarks, reviewing medical records, and preparing for vocational rehabilitation services. TR. 79-80, 84. Ms. Favaloro met with Mr. Clarks on September 6, 2001, for a vocational interview and to learn background information. TR. 80. Ms. Favaloro formulated a vocational rehabilitation report on September 26, 2001 regarding her September 6, 2001 meeting with Mr. Clarks. RX-12, p. 20. Ms. Favaloro summarized Mr. Clarks' background information, educational information, work history, and medical information. RX-12, pp. 20-22.

Ms. Favaloro indicated that Mr. Clarks spent his days driving around town, occasionally visiting his mother, sometimes exercising, and otherwise generally staying at home. TR. 80-81. Ms. Favaloro indicated that Mr. Clarks had a high school diploma and that Mr. Clarks' employment history consisted mostly of welding work after high school, but also included work as a school bus driver for about six years and part-time janitorial work. TR. 80-81. Ms. Favaloro testified that Mr. Clarks' employment history was significant for its stability. TR. 82.

Ms. Favaloro indicated that Mr. Clarks was seeing Dr. Bartholomew, who opined that Mr. Clarks was neurologically intact and was a candidate for surgery. TR. 82. Ms. Favaloro noted that Dr. Applebaum had also seen Mr. Clarks and that Dr. Applebaum had opined that Mr. Clarks did not require any further neurosurgical diagnostics. TR.

82-83. Ms. Favaloro noted that Mr. Clarks was also involved with Dr. Farris. TR. 82. Ms. Favaloro indicated that Mr. Clarks was taking Darvocet and was wearing a brace. TR. 82.

Ms. Favaloro administered vocational testing during Mr. Clarks' visit, in order to assess Mr. Clarks' reading, writing, and math abilities. TR. 83. According to Ms. Favaloro, Mr. Clarks was able to read at a grade equivalency of 4.5, meaning he can read simple words and phrases. TR. 83; RX-12, p. 22. Mr. Favaloro testified that Mr. Clarks was able to perform the four basic arithmetic operations with whole numbers. TR. 83; RX-12, p. 22. With respect to vocational analysis, Ms. Favaloro testified that Mr. Clarks' transferable skills included having used tools and equipment, having worked with precise set measurements, having driven a bus over a specified route, having made common sense decisions to carry out work instructions, and having performed repeat work. TR. 83-84; RX-22, p. 22. According to Ms. Favaloro, Mr. Clarks' past jobs required at least average aptitude and general intelligence, indicating that Mr. Clarks has the ability to learn new tasks. TR. 83-84; RX-22, p. 22.

On November 8, 2002, Ms. Favaloro formulated another vocational rehabilitation report regarding Mr. Clarks. TR. 84; RX-12, p. 12. Ms. Favaloro indicated that Dr. Applebaum had opined that Mr. Clarks was at maximum medical improvement, was not a surgical candidate, and was able to work with some restrictions. TR. 85. Ms. Favaloro conducted a labor market survey on Mr. Clarks. TR. 85. Given Mr. Clarks' age, educational background, geographic region, and work history, Ms. Favaloro identified a variety of jobs suitable for Mr. Clarks. TR. 85.

Ms. Favaloro identified a position entailing light janitorial work in a hotel/laundry that paid $6.50 per hour. TR. 85; RX-12, p. 12. Ms. Favaloro indicated that the position involved cleaning duties such as sweeping, mopping, and wiping down machines. RX-12, p. 12. The worker would also occasionally assist in loading and unloading industrial washing machines. RX-12, p. 12. The position allowed for alternate standing and walking, with occasional bending and occasional lifting of up to 40 pounds. RX-12, p. 12.

Ms. Favaloro next identified a garage cashier position at the Royal Sonesta Hotel. TR. 86; RX-12, p. 12. This position paid $6.50 per hour and entailed accepting parking tickets and conducting cash and credit card transactions using a register. TR. 86; RX-12, p. 12. The position was sedentary, with lifting of less than ten pounds, and the worker was allowed to stand at will. RX-12, p. 12.

Ms. Favaloro also identified a shuttle bus driver position at Treasure Chest Casino, in which the worker would transport passengers to and from parking areas. TR. 86; RX-12, p. 12. The position was sedentary and allowed for occasional standing and walking, with the majority of the shift spent driving a vehicle with an automatic transmission and

power steering. RX-12, p. 12. The worker was also required to complete a daily log of his runs and to write simple incident reports when necessary. RX-12, p. 12. The position paid $7.00 per hour to start and $8.20 per hour after one year. RX-12, p. 8. Ms. Favaloro testified that Mr. Clarks would have to first obtain a commercial driver's license, but that Mr. Clarks would be an attractive candidate for the position because of his work experience as a school bus driver for six years. TR. 89. Ms. Favaloro testified that the only requirement for the commercial driver's license was passage of an exam, for which study guides were available. TR. 113.

Ms. Favaloro also identified a dental lab trainee position at Pfisterer-Auderer that entailed use of the hands to make dental molds and impressions. TR. 86; RX-12, p. 13. Wages were $6.00 per hour and ongoing training was provided. TR. 86, 90; RX-12, p. 13. The position was entry-level. TR. 90. The position was sedentary, allowed for alternate sitting and standing, and required lifting of up to ten pounds. TR. 90, RX-12, p. 13. Ms. Favaloro testified that Mr. Clarks' experience as a welder would transfer well to the work required with his hands at this job. TR. 90.

Ms. Favaloro next identified a production technician position at Allfax, involving the rebuilding and manufacture of toner cartridges for fax machines. TR. 86; RX-12, p. 13. On-the-job training was offered, and the worker would learn to repair and restore the toner cartridges using small hand tools. RX-12, p. 13. The position allowed for alternate sitting, standing, and walking, with lifting of up to 20 pounds. RX-12, pp. 8, 13. Wages began at $7.50 per hour and increased to $8.00 per hour after 90 days of employment. TR. 86; RX-12, p. 13.

Ms. Favaloro next identified an inspector position at Walle Corporation, in which the worker would inspect labels of consumer products for accuracy and defects. TR. 86; RX-12, p. 13. The position required that the worker stand during a 12-hour shift. RX-12, p. 13. The job paid 6.00 per hour, with raises after three months and six months based on evaluations. TR. 86; RX-12, p. 13.

Ms. Favaloro next identified an unarmed security guard position at Weiser Security, a company that provides unarmed security services to various businesses. TR. 87; RX-12, p. 13. Ms. Favaloro indicated that the position was entry-level, with on-the-job training provided. TR. 90. Ms. Favaloro indicated that the job duties varied somewhat depending on the specific post, but generally included logging information and writing simple reports as necessary. RX-12, p. 13. Ms. Favaloro indicated that some posts require only limited reading skills and some posts are primarily seated positions. TR. 90-91; RX-12, p. 13. The position paid $6.00 to $7.00 per hour. TR. 87; RX-12, p. 13.

Ms. Favaloro testified that she informed all the identified employers about Mr. Clarks' profile, work history, and work restrictions. TR. 91. According to Ms. Favaloro, all the employers agreed to consider Mr. Clarks. TR. 88, 91. Ms. Favaloro opined that Mr. Clarks was employable at beginning wages of $6.00 to $7.50 per hour and could earn up to $8.00 per hour after 90 days. TR. 92; RX-12, p. 13.

Ms. Favaloro testified that she contacted Mr. Clarks through his attorney, given that Mr. Clarks was represented by counsel, to offer job placement services in October 2002. TR. 92-93. Ms. Favaloro testified that Mr. Clarks' attorney, Andrew Horstmyer, indicated disagreement with Dr. Applebaum's opinion about Mr. Clarks' work abilities and rejected Ms. Favaloro's offer. TR. 93.

Ms. Favaloro testified that after Mr. Clarks' compensation benefits were cut in the spring of 2003, Mr. Horstmyer agreed to have Mr. Clarks meet with Ms. Favaloro for job placement services and application information. TR. 93; RX-12, p. 18. According to Ms. Favaloro, she and Mr. Horstmyer agreed on February 24, 2003, to an appointment for March 13, 2003. TR. 93; RX-12, p. 18. Ms. Favaloro testified that she was prepared to review job leads, provide application instructions, and counsel Mr. Clarks in job-seeking skills. TR. 93-94, 105. Ms. Favaloro testified that she also would have encouraged Mr. Clarks to register with Job Service in order to search for other jobs. TR. 106. Ms. Favaloro testified that her job placement services have been helpful in the past when the client cooperates. TR. 94. Ms. Favaloro testified that Mr. Clarks did not appear for his appointment. TR. 94.

As a result of Mr. Clarks' missed appointment, Ms. Favaloro prepared on March 14, 2003, a report entailing some of the information she would have provided to Mr. Clarks at the meeting. TR. 94; RX-12, p. 7. In her March 14th report, Ms. Favaloro identified several positions suitable for Mr. Clarks, based on Dr. Applebaum's restrictions of no prolonged bending or stooping and no lifting of greater than 40 to 50 pounds. RX-12, pp. 7, 9. First, Ms. Favaloro noted the continued availability of the production technician, shuttle bus driver, inspector, and unarmed security guard positions identified by her in November 2002. RX-12, p. 8.

Ms. Favaloro next identified a photo lab worker position, an entry level position with on-the-job training provided. RX-12, p. 8. According to Ms. Favaloro, the worker would be required to learn to operate a photo processing machine to process and print film, to wait on customers and accept payments, and to clean and service the processing machines. RX-12, p. 8. The job required mostly standing during work, with sitting allowed during slower periods. RX-12, p. 8. Lifting was generally limited to 20 pounds, but rarely would involve lifting of 40 pounds. RX-12, pp. 8-9. The position paid $6.50 to $7.00 per hour. RX-12, p. 9.

Ms. Favaloro also identified a service writer position, in which the worker would greet customers for a car wash facility and write down the services requested by the customer. RX-12, p. 9. The position paid $7.00 per hour and involved mostly standing and walking, with lifting of less than 10 pounds. RX-12, p. 9.

Lastly, Ms. Favaloro identified a bridge monitor position for the South Shore Toll Plaza, in which the worker would monitor traffic through a toll plaza and report via radio any accidents or hazards on the bridge. TR. 96; RX-12, p. 9. The position required standing during peak traffic times, for approximately two hours at a time. TR. 96; RX-12, p. 9. Sitting would otherwise be allowed. TR. 96; RX-12, p. 9. Lifting of less than 20 pounds was also required. TR. 96; RX-12, p. 9. The position paid $7.27 per hour. RX-12, p. 9.

With respect to the March 14th positions, Ms. Favaloro testified that she again called the employers and informed them of Mr. Clarks' employment profile. TR. 94-95. Ms. Favaloro testified that the employers again all agreed to consider someone with Mr. Clarks' employment profile. TR. 94-95. Ms. Favaloro testified that Dr. Applebaum also approved all of the March 2002 positions identified by her. TR. 97; RX-12, pp. 4-6. Ms. Favaloro testified that she did not send the list of jobs to Dr. Bartholomew for approval because Dr. Bartholomew never responds to her correspondence. TR. 98, 110, 112, 123. Based on her March 2003 report, Ms. Favaloro opined that Mr. Clarks was employable at wages of approximately $6.00 to $7.50 per hour. TR. 98; RX-12, p. 9.

Ms. Favaloro performed another labor market survey on October 3, 2003, based on the work restrictions of Dr. Applebaum. RX-12, p. 1. Ms. Favaloro first identified a driver/cashier position, in which the worker would be required to drive an automatic transmission 15 passenger van to and from various parking lots. RX-12, p. 2. The worker would be required at times to work as a cashier using a computerized register. RX-12, p. 2. On-the-job training was offered. Rx-12, p. 2. Ms. Favaloro indicated that Mr. Clarks would be required to obtain a chauffeur driver's license, which could be obtained at the time of the job application. RX-12, p. 2. The position paid $6.50 per hour and allowed for alternate sitting, standing, and walking, with no meaningful lifting involved. RX-12, p. 2.

Ms. Favaloro next identified a toll collector position, which entailed collecting fees and making change for motorists passing through the toll booth. TR. 102; RX-12, p. 2. The worker would be required to keep track of his money and to clean his booth. RX-12, p. 2. The position required lifting of a 20 to 30 pound cash drawer twice a day and reaching with one upper extremity to service the motorists. TR. 102; RX-12, p. 2. Ms. Favaloro testified that the cash drawer could be transported in two or three trips if desired. TR. 102. Sitting and standing throughout the workday was allowed, and the position paid $7.50 per hour. TR. 102; RX-12, p. 2.

Ms. Favaloro next identified a garage cashier position, in which the worker would accept cash and credit card payments for time spent parking. RX-12, p. 2. The position paid $6.50 per hour and involved lifting of less than ten pounds. RX-12, p. 2.

Ms. Favaloro next identified a filler/label operator position with Baumer Foods. TR. 102, 105; RX-12, p. 2. This position entailed using a machine to fill empty bottles and then positioning the bottles on an assembly line for labeling by a labeling machine. RX-12, p. 2. The position required frequent use of the upper extremities and standing in the work area. RX-12, p. 2. The wages began at $5.50 per hour and increased to $6.25 per hour after a 90-day evaluation. RX-12, p. 2.

Ms. Favaloro next identified a forklift operator position with Baumer Foods, in which the worker would be seated while transporting boxes and company products. TR. 101; RX-12, p. 2. The position was entry-level, and in-house training regarding the forklift operation was offered. RX-12, p. 2. The position required operating levers with both upper and lower extremities. RX-12, p. 2. The position paid $6.25 per hour during training and $7.00 per hour after training. RX-12, p. 2.

Ms. Favaloro next identified a cashier position at Treasure Chest Casino, in which the worker would learn to operate a computerized cash register to itemize and total guests' food checks. RX-12, p. 2. According to Ms. Favaloro, the position involved working at the end of a buffet to total up checks and accept payment. TR. 104. The job allowed for alternate sitting and standing during the shift and required lifting of up to 10 pounds. TR. 104; RX-12, p. 3. Wages were $7.00 per hour. RX-12, p. 3.

Ms. Favaloro lastly identified a parking booth attendant position, in which the worker would greet customers, call in valet tickets, call for cabs, and open and close doors for customers. RX-12, p. 3. The position required standing and walking, but involved mostly sitting in a booth. RX-12, p. 3. The position also required lifting of up to 10 pounds. RX-12, p. 3. Wages were $7.00 per hour. RX-12, p. 3. Based on her October 2003 labor market survey, Ms. Favaloro opined that Mr. Clarks was employable at jobs paying $6.25 to $7.50 per hour. RX-12, p. 3.

Ms. Favaloro conducted her last labor market survey regarding Mr. Clarks on January 22, 2004. TR. 98-99; RX-12, p. 24. Ms. Favaloro indicated that she had reviewed the depositions of Drs. Farris, Applebaum, and Frickey prior to conducting the January 2004 survey, but that the depositions did not change her opinion as to Mr. Clarks' work capacity. TR. 99; RX-12, p. 24. In her January 2004 survey, Ms. Favaloro identified two parking booth cashier positions, with job requirements similar to the parking booth cashier positions previously identified by her. TR. 99; RX-12, p. 26. Wages for the first position were $6.25 to $6.75 per hour. RX-12, p. 26. Wages for the second position were $5.50 to $6.00 per hour. RX-12, p. 26. Ms. Favaloro testified that these parking booth cashier positions, with Central Parking and Standard Parking, were

commonly available in the area. TR. 103. Ms. Favaloro also identified a third parking booth cashier position, at Harrah's Casino, which paid $8.00 per hour. TR. 104; RX-12, p. 26.

Ms. Favaloro next identified a chauffeur position with London Livery, in which the worker would transport passengers to various destinations around New Orleans. RX-12, p. 26. Ms. Favaloro testified that this position was sedentary. TR. 100. The work required frequent sitting, with the ability to alternate postural positions on an occasional basis. RX-12, p. 26. Some of the chauffeur positions required lifting of up to 50 pounds while other positions required no meaningful lifting. TR. 99-100; RX-12, p. 26. The job paid $25,000 to $30,000 per year, or about $12.00 to $15.00 per hour according to Ms. Favaloro. TR. 100; RX-12, p. 26. Ms. Favaloro testified that Mr. Clarks could apply for a commercial driver's license when he applies for the job and that Mr. Clarks' experience as a school bus driver would be helpful in performing this work. TR. 99, 106-07. Ms. Favaloro testified that she called London Livery and informed them of Mr. Clarks' qualifications and that London Livery indicated it would consider someone with Mr. Clarks' qualifications. TR. 100-01, 106-07.

Ms. Favaloro next identified an unarmed security guard position with Metro Security that would provide services for high rise buildings. RX-12, p. 26. The requirements were similar to the previous unarmed security guard positions she identified. TR. 104; RX-12, p. 26. The position paid $5.15 to $7.50 per hour. RX-12, p. 26.

Ms. Favaloro next noted the continued availability of the Baumer Foods forklift operator, Treasure Chest cashier, toll collector, and filler/label operator positions identified in her October 2003 survey. RX-12, pp. 26-27. Based on her January 2004 survey, Ms. Favaloro opined that Mr. Clarks was employable at wages of $5.50 to $8.00 per hour, with the chauffeur position paying $25,000 to $30,000 per year. RX-12, p. 28.

Ms. Favaloro testified that she based her labor market surveys on the work restrictions outlined by Dr. Applebaum. TR. 114, 122. Ms. Favaloro testified that if Dr. Applebaum's opinion is not valid, her labor market survey would still be applicable as to the sedentary jobs, because Dr. Bartholomew had opined that Mr. Clarks was capable of performing sedentary work. TR. 102, 122-23.

Ms. Favaloro indicated that a position is sedentary according to the Dictionary of Occupational Titles if it involves sitting most of the day and lifting of no more than 10 pounds. TR. 102. Ms. Favaloro testified that many of the positions she identified were sedentary. TR. 87-90, 95, 101-04. The sedentary positions from her November 2002 survey were: the Royal Sonesta parking cashier job, the Treasure Chest casino shuttle driver position, the Pfisterer-Auderer dental lab trainee position, and the unarmed security guard position. TR. 87-90, 95, 101-04. The sedentary positions from her

January 2004 survey were: the parking booth cashier positions, the Metro Security unarmed security guard position, the Baumer Foods forklift operator position, the Treasure Chest cashier position, the toll collector position, and the London Livery chauffeur position. TR. 87-90, 95, 100-04.

IV. OTHER DOCUMENTS

Automobile Accident

The police report for Mr. Clarks' October 17, 2001 car accident indicates that Mr. Clarks was stopped at a red light in a 1993 Chevrolet Lumina when he was rear ended by a 1999 Ford F-150. RX-14, pp. 6-8. The officer indicated that both cars suffered minor damage. RX-14, p. 9. Estimates for repairs to Mr. Clarks' Lumina from DJ's and Associates Automotive Repair and from State Farm Insurance indicate that the repairs would total about $1,300.00. RX-14, pp. 14-30. In September 2002, Mr. Clarks settled his case with State Farm Insurance and the driver at fault for $20,000.00. RX-14, pp. 52-53.

Foresight

Foresight performed surveillance services in this case on behalf of EIU. RX-15. Mr. Clarks was watched on four different occasions beginning December 15, 2003 and ending December 29, 2003. RX-15, p. 2. During these occasions, Mr. Clarks was observed at a grocery store and convenience store. RX-15, p. 2. On one occasion, Mr. Clarks was observed running from the convenience store to his car to avoid the rain. RX-15, p. 2. Mr. Clarks did not exhibit any outward indications of restrictions or limitations. RX-15, pp. 2-4.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221.

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. §554, by way of 20 C.F.R. §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the LHWCA, a worker must satisfy both a situs and status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker…." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, Mr. Clarks worked as a welder for EIU at Avondale Shipyard. TR. 25, 44; CX-E, p. 5. In addition, Mr. Clarks' work incident occurred while he was helping lift a toolbox at Avondale Shipyard. TR. 25-26, 44. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

A. Section 20(a) Presumption

The claimant has the burden of establishing a prima facie case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318 (1982). Once the claimant establishes these two elements of his *prima facie*

case, Section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. triple A Machine Shop, 13 BRBS 326 (1981); Hamptom v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990).

The Court finds that Mr. Clarks has established a *prima facie* case of compensability and is entitled to the §20(a) presumption. First, Mr. Clarks testified that he suffers from back and leg pain that prevents him from working. TR. 38-39. According to Dr. Bartholomew, the treating physician in this case, Mr. Clarks has a herniated disc at the L5-S1 level and should have surgery to alleviate his pains. CX-A, p. 12; CX-B, pp. 18-19, 27-28. Second, Mr. Clarks testified that his back and leg pains stem from a work incident in which he helped a co-worker, Calvin Jacks, lift a toolbox. TR. 25-26. Mr. Clarks testified that his pains began the night of the toolbox incident. TR. 26, 52-57, 67. Mr. Jacks testified that Mr. Clarks did indeed help him lift a toolbox, a few days after which Mr. Clarks reported to Mr. Jacks that Mr. Clarks had hurt his back during the incident. TR. 71-76. The Court finds that Mr. Clarks and Mr. Jacks' testimony is credible. Based on the foregoing, the Court finds that Mr. Clarks has established that he suffered an injury and that a work incident occurred that could have caused his injury. Therefore, Mr. Clarks is entitled to the § 20(a) presumption.

B. Rebuttal Evidence

After the Section 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vicchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

The Court finds that there is sufficient evidence in this case to rebut the § 20(a) presumption. First, Dr. Applebaum evaluated Mr. Clarks on four occasions and concluded that Mr. Clarks had only insignificant degenerative changes in his back that required no professional treatment. RX-4, pp. 2, 8; RX-16, pp. 11, 23-25, 43-44, 50-55. Likewise, Dr. Farris opined that Mr. Clarks could return to work with no restrictions. CX-D, pp. 13-14. Dr. Applebaum also indicated that Mr. Clarks' symptoms may be related to his car accident in October 2001, in which Mr. Clarks was rear-ended. RX-16, p. 37. Based on the foregoing, the Court finds that substantial evidence exists to rebut the § 20(a) presumption that Mr. Clarks suffers from an employment-related injury.

C. Causation Based on the Evidence as a Whole

After considering the evidence as a whole, the Court finds that Mr. Clarks does suffer from an employment-related back condition. First, the evidence weighs in favor of finding that Mr. Clarks' pains stem from a disc condition at the L5-S1 level, contrary to Dr. Applebaum's opinion. Based on the interpretation of Dr. Heard, Mr. Clarks' January 23, 2001 MRI results indicated that Mr. Clarks had a disc extrusion in his lumbar spine at the L5-S1 level which resulted in mild central spinal stenosis. CX-G. Dr. Bartholomew also indicated that Mr. Clarks' January 23, 2001 MRI revealed a herniated/extruded disc at the L5-S1 level. CX-A, p. 25; CX-B, p. 7. In addition, Mr. Clarks' February 26, 2002 lumbar myelogram and post-myelogram CT scan of the lumbar spine revealed, according to Dr. Ramirez, a concentric disc bulge at the L5-S1 level that was approaching/contacting the S1 nerve root bilaterally. CX-G. Dr. Bartholomew also reviewed Mr. Clarks' February 2002 film and opined that Mr. Clarks had a large AMI and a disc herniation at the L5-S1 level that was contacting nerve roots. CX-A, p. 14; CX-B, p. 16. Dr. Bartholomew related Mr. Clarks' back and leg pain to this herniated disc, explaining that Mr. Clarks' leg pain was being caused by nerve root contact with the herniated disc while Mr. Clarks' back pain was being caused by the disc displacement itself. CX-B, pp. 9-11, 16.

The Court is not persuaded by the opinion of Dr. Applebaum that Mr. Clarks has only mild degenerative changes in his lumbar spine with no neurological impingement or impairment. RX-16, pp. 23-25, 50-55. Dr. Applebaum's opinion conflicts with the weight of the medical evidence, specifically the findings of Drs. Heard, Ramirez, and Bartholomew. Dr. Applebaum's reading of Mr. Clarks' MRI and CT scan is significantly at odds with Dr. Heard and Dr. Ramirez's respective readings. With respect to the MRI, Dr. Applebaum opined that the film revealed only minimal bulging at the L5-S1 level, which was related to aging and was not clinically significant. RX-4, p. 2; RX-16, pp. 11, 30-33, 50-51. With respect to the CT scan, Dr. Applebaum opined that the film did not reveal a disc bulge at the L5-S1 level at all, explaining that the bulging found in Mr. Clarks' MRI had probably resolved based on the body's normal healing process. RX-4, p. 8; RX-16, pp. 19, 43-45, 53. Despite Mr. Clarks' ongoing pains, positive straight right leg test results, diminished sensation to a pinprick to his right foot, and bowel complaints, all of which could suggest disc pathology according to Dr. Applebaum, Dr. Applebaum opined that Mr. Clarks did not require any professional care. RX-4, p. 6; RX-16, pp. 17-25, 34, 42-43, 45-46, 49, 55. Accepting Dr. Applebaum's opinion as fact in this case would require discounting Mr. Clarks' test results as interpreted by uninterested physicians, as well as discrediting Mr. Clarks' need for ongoing treatment of his pains. The Court will not do so. The Court finds that Dr. Applebaum's findings are contrary to the weight of the medical evidence, and therefore Dr. Applebaum's opinion regarding the nature and cause of Mr. Clarks' pains is entitled to less weight than Dr. Bartholomew's opinion.

Second, the Court finds that Mr. Clarks' pains are not related to his car accident in October 2001. Mr. Clarks' back and leg pain complaints began on December 7, 2000, shortly after his work accident, and became an ongoing problem well before his car accident occurred. TR. 25-26, 52-57, 67, 72-75; CX-A, pp. 19, 21, 23, 25; CX-B, pp. 5-11; CX-D, pp. 6-10; RX-16, pp. 6-8, 11-12. Furthermore, Mr. Clarks' lumbar spine MRI of January 2001, which was performed prior to the car accident, indicated that Mr. Clarks already had a herniated disc at the L5-S1 level. CX-G. Likewise, Dr. Bartholomew opined beginning in June 2001 that Mr. Clarks' complaints were related to a traumatic herniated disc. CX-A, p. 25; CX-B, p. 8.

Mr. Clarks testified that his back pain increased only temporarily as a result of the car accident. TR. 38, 58-59, 64-65. Dr. Frickey, who treated Mr. Clarks for his car accident injuries, opined that Mr. Clarks suffered only a neck sprain and lumbar spine sprain due to the car accident. CX-C, pp. 11-13, 48; RX-2, p. 2. Dr. Frickey explained that Mr. Clarks' lumbar spine sprain from the car accident was superimposed in the same area as his herniated disc, but that the injuries were separate and required separate treatments. CX-C, pp. 38-39, 48. Dr. Frickey opined on April 15, 2002, that Mr. Clarks' lumbar spine sprain was at maximum medical benefit in relation to her care. CX-C, pp. 40-41; RX-2, p. 3. Given the testimony by Mr. Clarks and Dr. Frickey, both of whom the Court determines is credible, the Court finds that Mr. Clarks' car accident affected his back pains only temporarily, due to a lumbar spine sprain that has resolved. Therefore, the Court finds that Mr. Clarks' back condition is not related to his October 2001 car accident.

Third, the weight of the evidence supports a finding that Mr. Clarks did hurt his back at work on December 6, 2000, while helping Mr. Jacks lift a toolbox. Although the First Aid Office's December 7, 2000 First Report of Injury document indicates that Mr. Clarks was injured on December 7, 2000 with no specified location and that Mr. Clarks reported he did not do anything at work to make his back hurt, Mr. Clarks testified that the report was erroneous. TR. 51-52; RX-1, p. 1. Mr. Clarks testified that he stated to the First Aid worker that he had hurt his back on December 6th while lifting a toolbox in the yard. TR. 52. Mr. Clarks testimony is consistent with the testimony of Mr. Jacks, who indicated that Mr. Clarks reported to him a couple days after the toolbox incident that Mr. Clarks had hurt his back while helping with the toolbox. TR. 71-75. Mr. Clarks' testimony is also consistent with the history he gave to Dr. Farris on December 14, 2000, that he had hurt his lower back on December 6th while lifting a toolbox. CX-D, pp. 6-7; RX-3, p. 1. Given the proximity of Mr. Clarks' visit to the First Aid Office on December 7th, his conversation with Mr. Jacks a couple days after the toolbox incident, and Mr. Clarks' visit with Dr. Farris on December 14th, the Court finds that it is more likely the First Report of Injury document was filled out incorrectly than that Mr. Clarks, within one week's time, gave inconsistent statements about the date and cause of his injury. Mr. Clarks also reported to Dr. Applebaum on February 6, 2001, and Dr.

Bartholomew on June 5, 2001, that he had hurt his back while lifting a toolbox at work in December 2000. CX-A, p. 25; CX-B, p. 6; RX-4, p. 1; RX-16, p.7.

Also significant to the Court is the fact that Mr. Clarks reported to Dr. Frickey in October 2003 that he had suffered an on-the-job injury in December 2000 that caused a herniated disc at the L5-S1 level. RX-2, p. 1. Mr. Clarks was referred by his attorney to Dr. Frickey for complaints related to Mr. Clarks' car accident, including back pain. RX-2, p. 1. Despite Respondents' assertion that Mr. Clarks has a galaxy of stories regarding the cause of his back pain, Mr. Clarks' history to Dr. Frickey was entirely consistent with his testimony before the Court. The fact that Mr. Clarks reported his work-injury history to Dr. Frickey, when such information may have been detrimental to his car accident case, contradicts Respondents' assertion that Mr. Clarks has not been consistent regarding the cause of his back pain. Based on the foregoing, the Court finds that Mr. Clarks' back and leg pains are related to his December 6, 2000 toolbox incident at work.

NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "Incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage-earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum medical benefit of medical treatment such that his condition will not improve. This date is

primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

Because Mr. Clarks' original back condition is related to his employment at EIU, Respondents are responsible for the disability resulting from that condition. According to Dr. Bartholomew, Mr. Clarks should undergo a diskectomy or spinal fusion to alleviate his back and leg pains and perhaps his problem with urological urgency. CX-A, p. 12; CX-B, pp. 18-19, 27-28. Mr. Clarks agreed to undergo a diskectomy, and possibly a fusion afterward if necessary. CX-A, p. 12; CX-B, p. 19. Because surgery is anticipated for Mr. Clarks' condition, the Court finds that Mr. Clarks' condition has not yet reached permanency under the Act. See Kuhn v. Associated Press, 16 BRBS 46, 48 (1983); Walker v. National Steel & Shipbuilding Co., 8 BRBS 525, 528 (1978).

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3rd Cir. 1979). For the job opportunities to be realistic, however, the employer must establish the precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

In this case, Dr. Bartholomew opined that Mr. Clarks might be able to return to sedentary work as long as Mr. Clarks could frequently alternate his sitting, standing, and walking positions and was not taking medication that interfered with his ability to think or function. CX-B, p. 30. Because Mr. Clarks' work at EIU as a welder exceeds the parameters of sedentary employment, the Court finds that Mr. Clarks has established a *prima facie* case of total disability. This total disability began on December 14, 2000, when Mr. Clarks was first restricted from work by Dr. Farris. CX-D, p. 7.

However, the Court also finds that Respondents established the existence of suitable alternative employment as of November 8, 2002, the date of Nancy Favaloro's first labor market survey regarding Mr. Clarks. RX-12, pp. 11-14. Although Ms. Favaloro based her labor market surveys on the findings of Dr. Applebaum, some of the positions identified in Ms. Favaloro's November 2002 labor market survey were sedentary and would be suitable for Mr. Clarks according to Dr. Bartholomew's opinion. Ms. Favaloro testified that the sedentary positions identified in November 2002 report were the Royal Sonesta parking cashier job, the Treasure Chest Casino shuttle driver position, the Pfisterer-Auderer dental lab trainee position, and the Weiser Security unarmed security guard position. TR. 87-90, 95, 101-04. Of these four positions, the Court finds that the Royal Sonesta parking cashier position, the Pfisterer-Auderer dental lab trainee position, and the unarmed security guard position constitute suitable alternative employment for Mr. Clarks. These positions entail primarily seated work, but allow for standing at will. RX-12, pp. 12-13. The Court finds that the Treasure Chest Casino shuttle driver position is not suitable for Mr. Clarks because the position primarily requires driving, while allowing for only occasional standing and walking. RX-12, p. 12. Therefore, the shuttle driver position is incompatible with Dr. Bartholomew's restriction that Mr. Clarks have the ability to frequently change his positions. CX-B, p. 30.

Other sedentary positions identified by Ms. Favaloro were the parking booth cashier positions at Central Parking, Standard Parking, and Harrah's Casino, the Metro Security unarmed security guard position, the Baumer Foods forklift operator position, the Treasure Chest cashier position, the toll collector position, and the London Livery chauffeur position. TR. 100-04; RX-12, pp. 26-27. The Court finds that the parking booth cashier positions, the Metro Security guard position, the Treasure Chest cashier position, and the toll collector position meet the restrictions of Dr. Bartholomew and constitute suitable alternative employment for Mr. Clarks. These jobs all predominantly require seated work and allow for alternating positions throughout the work day. RX-12, pp. 26-27. Because the forklift operator and chauffeur jobs both entail mostly sitting and driving, while allowing for only occasional alternate postural positions, the Court finds that the forklift operator and chauffeur jobs are not suitable for Mr. Clarks.

If the employer meets its burden and shows the existence of suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then his disability is at most partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985). In this case, the Court finds that Mr. Clarks has not demonstrated diligence and a willingness to work. First, there is no evidence that Mr. Clarks has conducted any independent job search. TR. 39. Second, Mr. Clarks failed to meet with Ms. Favaloro for job placement services, despite the fact that Ms. Favaloro offered on two separate occasions to perform such services for him. TR. 65, 92-94; RX-12, p. 18. Given Mr. Clarks' lack of effort in

finding suitable alternative work, the Court finds that Mr. Clarks has failed to rebut Respondents' showing of suitable alternative employment in this case.

WAGE-EARNING CAPACITY

The Act requires that the wages earned in a post-injury job be adjusted to account for inflation in order to represent the wages the job paid at the time of the claimant's injury, insuring that wage-earning capacity is considered on a equal footing with the determination under § 10 of average weekly wage at the time of injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard v. Sun Shipbuilding and Dry Dock Co., 12 BRBS 691, 695 (1980). The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). In addition, a court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In November 2002, the hourly wages for the Royal Sonesta parking booth cashier position, Pfisterer-Auderer dental lab trainee position, and Wesier Security guard position were $6.50, $6.00, and $6.00-$7.00, respectively. RX-12, pp. 12-13. The average of these hourly wages equate to $6.33.[4] The NAWW in December 2000, when Mr. Clarks suffered his work injury, was $466.91, and the NAWW in November 2002, when Ms. Favaloro identified these three positions, was $498.27. United States Dept. of Labor, Employment Standards Administration (June 18, 2004). Adjusting the November 2002 average hourly wage of $6.33 in consideration of the NAWW, the Court finds that the proper wage-earning capacity for Mr. Clarks in December 2000 wages with respect to these three positions, is $5.93/hour or $237.20/week.[5]

The NAWW for October 1, 2003 through September 30, 2004, the period when Ms. Favaloro identified the remaining suitable alternative positions, is $515.39. United States Dept. of Labor, Employment Standards Administration (June 18, 2004). Ms. Favaloro identified the hourly wages for the Central Parking, Standard Parking, and Harrah's Casino parking cashier positions respectively as $6.25-$6.75, $5.50-$6.00, and $8.00. TR. 103; RX-12, p. 26. Ms. Favaloro identified the hourly wages for the Metro Security guard position, Treasure Chest cashier position, and toll collector position respectively as $5.15-$7.50, $7.00, $7.50. RX-12, pp. 2-3, 26. The average of the hourly

[4] The Court calculated this average based on an assumed hourly wage of $6.50 for the Weiser Security position.

[5] The Court arrived at these figures by calculating the proportion: *x*/ $466.91 = $6.33/$498.27.

wages of these six jobs equates to $6.85.[6] Adjusting this average hourly wage of $6.85 in consideration of the NAWW from October 2003 to September 2004, the Court finds that the proper wage-earning capacity for Mr. Clarks in December 2000 wages with respect to these six positions, is $6.21/hour or $248.40/week.[7] Averaging the figure of $248.40/week with $237.20/week, which was the weekly average calculated for the three November 2002 positions, the Court finds that the proper wage-earning capacity for Mr. Clarks in December 2000 wages is $242.80 per week. Therefore, Mr. Clarks has a residual wage-earning capacity of $242.80 per week.

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The § 10(a) formula requires evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981). Where there is no such evidence, § 10(a) cannot be utilized. Taylor, 14 BRBS at 495; Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976). In this case, there is no evidence in the record as to the number of days Mr. Clarks actually worked during the measuring year. Without such information, it would be impossible to calculate an average daily wage. Therefore, the Court finds that § 10(a) is inapplicable to this case.

Because Section 10(a) is not applicable, the Court will look to § 10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under § 10(a). See 33 U.S.C. § 910(b). Because no evidence was presented concerning the wages of a similarly situated employee, the Court finds that § 10(b) is also inapplicable to this case.

[6] The Court calculated this average based on an assumed hourly wage of $6.50 for the Central Parking position, $5.75 for the Standard Parking position, and $6.33 for the Metro Security position.

[7] The Court arrived at these figures by calculating the proportion: *x*/ $466.91 = $6.85/$515.39.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to § 10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c). The Court finds that Mr. Clarks worked 1,633.50 hours in 50 weeks during the measuring year in this case, or an average of 32.67 hours per week. RX-13. Mr. Clarks earned, for LHWCA purposes, $11.00 per hour.[8] RX-13. Based on an average of 32.67 hours per week and a wage rate of $11.00, a fair and reasonable approximation of Mr. Clarks' annual wage earning capacity for the 52 weeks preceding his injury is $18,687.24. Dividing $18,687.24 by 52 weeks, pursuant to § 10(d), yields an average weekly wage of $359.37. The Court finds that this figure fairly represents a calculation of Mr. Clarks' average weekly wage at the time of his work injury and is acceptable under § 10(c), a section under which the Court has wide discretion.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir.

[8] During the measuring year, Mr. Clarks was paid $11.00 per hour, with a $7.00 per hour *per diem*. TR. 39-40; RX-13. The *per diem* portion of his earnings was not taxed. TR. 39-40. Section 2 (13) of the Act states in part: "The term 'wages' means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C title 26 (relating to employment taxes)." 33 U.S.C. § 902 (13). Because the *per diem* portion of Mr. Clarks' earnings is not taxed as specified in § 2 (13) of the Act, Mr. Clarks' *per diem* earnings are not includable as wages for purposes of determining his average weekly wage under the Act. See H.B. Zachry Co. v. Quinones, 206 F.3d 474, 477-79, 34 BRBS 23, 25-27 (CRT) (5th Cir. 2000); McNutt v. Benefits Review Bd., 140 F.3d 1247, 1248, 32 BRBS 71, 72 (CRT) (9th Cir. 1998).

1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

Because Mr. Clarks has established that he suffers from a disc pathology related to his employment with EIU, Respondents are responsible for all past and future medical expenses arising from that condition, including the spinal surgery recommended by Dr. Bartholomew. In addition, Mr. Clarks' urological complaints may be related to his disc problem. CX-A, p. 12; CX-B, p. 19; RX-16, p. 34. Therefore, Respondents are also responsible for the urological consultation recommended by Dr. Bartholomew. CX-A, p. 14; CX-B, pp. 17-20.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from December 14, 2000 until November 8, 2002, based on an average weekly wage of $359.37.

2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from November 8, 2002 and continuing, based on an average weekly wage of $359.37 and reduced by a residual wage-earning capacity of $242.80.

3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this Decision and Order filed with the District Director. See 28 U.S.C. § 1961.

4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

5) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, with interest in accordance with 28 U.S.C. § 1961, which are the result of Claimant's work-related disc pathology.

6) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge